(5)

No. 98-262
In the Supreme Court of the United States
October Term, 1998

KENNETH L. McGINNIS, et al,

Petitioners,

v.

EVERETT HADIX, et al,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR PETITIONERS

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40 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in litigation pending on the effective date of the Prison Litigation Reform Act, the attorney fee provision of PLRA Sec. 803(d), 42 U.S.C. § 1997e(d), applies to fees awarded after the Act's effective date for services rendered after that date.

2. Whether, in such litigation, this fee provision applies to fees awarded after the Act's effective date for services rendered before that date.

PARTIES TO THE PROCEEDING

McGinnis v. Hadix:

Petitioners, Kenneth L. McGinnis is Director of the MDOC; Dan Bolden is Deputy Director for the Bureau of Correctional Facilities; Denise Quarles is the Regional Administrator; Thomas G. Phillips; Bruce Curtis; Henry Grayson; and Barry McLeMore are Wardens at the SPSM facilities; Travis Jones; Harold White; David Jamrod; and Carmen Palmer are Deputy Wardens at the SPSM facilities. David Laurin; Fred Parker; Marilyn Ruben; and Mike Rankin are Business Managers. Marjorie VanOchten is Administrator for Office of Policy and Hearings.[1]

Respondents, Everett Hadix; Richard Mapes; Patrick C. Sommerville; Roosevelt Hudson, Jr.; Brent E. Koster; Lee A. McDonald; Darryl Sturges; Robert Flemster; William Lovett; James Covington; James Hadix; and several John Does, are persons who are or were confined in the custody of the Michigan Department of Corrections.

McGinnis v. Glover:

Petitioners, Kenneth McGinnis is Director of the MDOC; Griffin Rivers is Director of MDOC's Bureau of Programs; Dan Bolden is Director of MDOC's Bureau of Correctional Facilities; Lloyd Kimbrell is Director of MDOC's Bureau

[1] These petitioners are the successors in office to Perry Johnson, Robert Brown, Graham Allen, Dale Foltz, Elton Scott, Pam Withrow, Frank Elo, John Jabe, Charles Utess and John Prelesnik, and are automatically substituted for them pursuant to Sup. Ct. R. 35.3. A number of these positions have been expanded from one person to four people as the prison has been divided and each has been assigned its own staff hierarchy. Marjorie VanOchten's previous title was Hearings Administrator.

of Prison Industries; Robert Steinman is Director of the MDOC's Bureau of Field Services; Joan Yukins is Warden of the Scott Correctional Facility; Sally Langley is Warden of the Florence Crane Correctional Facility.[2]

Respondents, Mary Glover; Lynda Gates; Jimmie Ann Brown; Manetta Gant; Jacalyn M. Settles; and several Jane Does, on behalf of themselves and all others similarly situated are persons who are or were confined in the custody of the Michigan Department of Corrections.

[2] These petitioners are the successors in office of Perry Johnson, William Kime, Robert Brown, Jr., Frank Beetham, and Richard Nelson, respectively, and are automatically substituted for them pursuant to Sup. Ct. R. 35.3. Gloria Richardson, Dorothy Costen, and Clyde Graven, all listed as Defendants in the original action, are no longer Defendants due to the closure of certain facilities as women's prisons. Joan Yukins, and Sally Langley were added as Defendants due to the opening of new facilities for women prisoners. Florence R. Crane, G. Robert Cotton, Thomas K. Eardley, Jr., B. James George, Jr., Duane L. Waters, and the Michigan Corrections Commission are no longer Defendants due to the dissolution of that Commission.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER

OPINIONS BELOW

The opinion of the Court of Appeals is reported at *Hadix v. Johnson*, 143 F.3d 246 (6th Cir. April 17, 1998) and is reproduced in the Appendix to the Petition, Pet. App. 1a. Rehearing was denied June 18, 1998. Pet. App. 42a. The prior opinions of the United States District Court for the Eastern District of Michigan, *Hadix v. Johnson* (No. 80-73581, December 4, 1996) and *Glover v. Johnson* (No. 77-71229, December 4, 1996) are not officially reported, and are reproduced at Pet. App. 27a, 33a.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on April 17, 1998. On June 18, 1998, the Court of Appeals issued its Order denying Petitioners' Petition for Rehearing En Banc. Pet. App. 42a.

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 802(b)(1) of the Prison Litigation Reform Act (PLRA), 18 U.S.C. § 3626, provides:

> Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title.

Section 803(d) of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(d), amending section 7 of the Civil Rights of Institutionalized Persons Act provides:

(d) ATTORNEY'S FEES.

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. § 1988), such fees shall not be awarded, except to the extent that -

(A) the fee was directly and reasonably incurred in proving an actual violation of the Plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation;

or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the Defendant. If the award of attorney fees is not greater than 150 percent of the Judgment, the excess shall be paid by the Defendant.

(3) No award of attorney fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, United States Code, for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the Defendant pursuant to section 2 of the Revised Statutes of the United States (42 U.S.C. § 1988).

The PLRA's effective date was April 26, 1996.

STATEMENT OF THE CASE

A. The Court of Appeals Opinions.

In three decisions (*Glover v. Johnson*, 138 F.3d 229, 246-251 (6th Cir., 1998), App. 164a, 194a-205a ; *Hadix v. Johnson*, 144 F.3d 925, 946-948 (6th Cir., 1998) App. 96a, 98a-102a; and the present consolidated cases, *Hadix v. Johnson*, 143 F.3d 246; Pet. App. 1a-26a) the Court of Appeals held that the PLRA attorney fee limitation does not apply to fees awarded for services rendered in any case pending on the effective date of the Act.

The Court of Appeals opinion below summarized the nature of this case and the course of proceedings, 143 F.3d at 248-250; Pet. App. 2a-7a:

> The major issue before us is whether the attorney fee limitation of section 803(d) of the Prison Litigation Reform Act ("PLRA" or the "Act"), 42 U.S.C. § 1997e(d) applies to work performed after the PLRA's enactment date of April 26, 1996 in a case filed before the enactment date. Section 803(d), among other things, places a cap on the hourly rate attorneys may be awarded under 42 U.S.C. § 1988 in civil rights litigation brought by prisoners. 42 U.S.C. § 1997e(d)(3). Recently, in a separate *Glover* appeal, we held that section 1997e(d) does not apply to work performed prior to the PLRA's enactment. *Glover v. Johnson*, 138 F.3d 229 (6th Cir. 1998).[3] For reasons fully explained below, we conclude that section 1997e(d) is likewise inapplicable to post-enactment work. Neither the language of the statute nor the legislative history permits us to conclude that Congress intended to differentiate between pre-enactment and post-enactment services.

[3] [App. 164a. Note: Petitioners did not file a petition for writ of certiorari from this decision, but the opinion is reproduced in the Joint Appendix, in response to the second issue specified in this Court's order granting the petition in the present case. See also, *Hadix v. Johnson*, 144 F.3d 925, 946-948 (6th Cir., 1998.)]

* * *

I. OVERVIEW OF THE LITIGATION

A. *Glover v. Johnson*

In 1977, a now-certified class of female inmates incarcerated in the Michigan prison system, filed an action pursuant to 42 U.S.C. § 1983 in which they alleged violations of certain constitutional rights surrounding the conditions of their confinement. The District Court found that the *Glover* plaintiffs had been denied the same vocational and educational opportunities provided to male inmates, in violation of the Equal Protection Clause of the Fourteenth Amendment, and that the female inmates had been unconstitutionally denied meaningful access to the courts. *Glover v. Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979) ("*Glover I* "). After extensive negotiations, the District Court entered an order specifying remedial actions to be undertaken by the defendants to remedy the constitutional violations found and retained jurisdiction until substantial compliance with the remedial order is achieved. *Glover v. Johnson*, 510 F. Supp. 1019 (E.D. Mich. 1981) ("*Glover II*"). Neither of these orders were appealed by defendants.

On November 12, 1985, the parties stipulated to an order of the District Court, which awarded plaintiffs attorney fees, including fees for monitoring defendants' compliance with the District Court's orders, and established a system providing for plaintiffs' submission of fees and costs on a semi-annual basis and for the lodging of defendants' objections thereto. [App. 125a] This 1985 Order, which plaintiffs contend establishes their entitlement to monitoring fees,

has never been appealed. It provides in relevant part:

> IT IS HEREBY ORDERED that Plaintiffs are entitled to attorney fees and that requests for such fees shall be submitted to opposing counsel every six months. Defendants will have twenty-eight days in which to contest the amount of the fee request.

Thus, since 1985, the parties have followed this procedure and plaintiffs' attorneys have been paid attorney fees at the prevailing market rate, which has increased over the years, to the current rate of $150.00 per hour. In a Memorandum Opinion and Order dated November 27, 1989 (the "1989 Order"), the District Court interpreted its 1985 Order as authorizing attorney fees for monitoring compliance with the court's orders in this case in addition to non-monitoring legal work, and as having decided the prevailing party issue. [App. 130a] It also held that the prevailing party issue will not be re-decided with each petition for fees, and that the court is therefore not required to await the completion of an appeal before determining whether plaintiffs are prevailing parties on otherwise compensable work. Defendants appealed the 1989 Order, and this Court affirmed the District Court's holdings. *Glover v. Johnson*, 934 F.2d 703 (6th Cir. 1991) ("*Glover III* ").

B. *Hadix v. Johnson*

In 1980, a class of male prisoners incarcerated in the State Prison of Southern Michigan, Central Complex ("SPSM-CC"), brought a class action pursuant to 42 U.S.C. § 1983 alleging violations of their rights under the First, Eighth, Ninth and Fourteenth

Amendments to the Constitution. The parties entered into a comprehensive consent decree, which was approved by and made an order of the District Court on April 4, 1985. The detailed 33-page consent decree addresses sanitation, health care, fire safety, overcrowding, volunteers, access to courts, food service, management, operations and mail at SPSM-CC and called for the submission of more detailed remedial plans to carry out a number of the consent decree mandates. Overall, the consent decree was intended to "assure the constitutionality" of the conditions of confinement at SPSM-CC. The Court retained jurisdiction to enforce the terms of the consent decree until compliance is achieved. Plaintiffs' attorneys have responsibility for monitoring defendants' compliance with the decree, which continues to this day.

On November 19, 1987, the District Court entered an order awarding fees and costs to plaintiffs' attorneys for compliance monitoring. [App. 79a] Plaintiffs construe this order as establishing their entitlement to post-judgment monitoring fees. Under the terms of this order, defendants have the right to review and make objections to plaintiffs' fee requests. In the absence of agreement, the District Court will resolve the fee dispute.

II. PROCEEDINGS BELOW

In *Glover* and *Hadix*, each class of plaintiffs filed a fee petition for work performed from January 1, 1996 through June 30, 1996 pursuant to established procedure. Appeal Nos. 96-2586/2588 and 96-2567/2568. The *Glover* plaintiffs filed a second fee petition that covered all outstanding fees and costs related to work on two appeals. Appeal No. 97-1272. Defendants objected on several grounds to all

three petitions. The District Court rejected all but one of the objections in three separate orders.

Defendants argued that the attorney fee limitation of the PLRA should be applied to the fee petitions in appeal Nos. 96-2586/2588 and 96-2567/2568. In nearly identical opinions, the District Court held the fee provision inapplicable to fees earned before enactment of the PLRA but applied it to those earned thereafter. [Pet. App. 27a, 33a.]

Defendants also objected to fees for work on all appellate matters in the *Glover* fee petitions in appeal Nos. 96-2586/2588 and 97-1272, which included work on three appeals, because plaintiffs had not prevailed in these matters. The first involves Case No. 94-1617, a 1996 appeal regarding defendants' obligation to provide legal assistance to plaintiffs for parental rights matters. This case has been decided against plaintiffs and the Supreme Court has denied their petition for certiorari. *Glover v. Johnson*, 75 F.3d 264 (6th Cir.) ("*Glover IV* "), *cert. denied*, ___ U.S. ___, 117 S. Ct. 67, 136 L.Ed.2d 28 (1996) (hereinafter referred to as the "parental rights appeal"). The second involves appeal Nos. 95-1903/95-2037/95-2120/96-1155, consolidated appeals regarding a Compliance Committee established by the District Court (hereinafter referred to as the "Compliance Committee appeals"). These appeals were voluntarily dismissed by stipulation of the parties in March, 1996 upon dissolution of the Committee by the District Court. The third involves appeal No. 95-1521, an appeal regarding the District Court's denial of defendants' motion to terminate the District Court's supervisory jurisdiction because substantial compliance with the Remedial Plan had been achieved (hereinafter referred to as

the "termination appeal"). We recently vacated this judgment, retained jurisdiction and remanded the matter to the District Court for a new determination of whether a disparity now exists between female and male inmates in educational and vocational opportunities in violation of the Equal Protection Clause of the Fourteenth Amendment and whether female inmates are presently being denied access to the courts in violation of the First Amendment. *Glover v. Johnson*, 138 F.3d 229 (6th Cir. 1998) ("*Glover V*"). [App. 164a.]

In rejecting this challenge, the District Court concluded that plaintiffs were deemed prevailing parties in the 1985 Order, that plaintiffs are not required to establish prevailing party status each time fees are sought but instead need only establish that the legal work was reasonably related to ensuring compliance with the District Court's orders. The District Court went on to conclude that the legal work at issue in all three appeals was related to monitoring compliance with the Remedial Plan and consequent court orders.

The District Court also rejected defendants' objection that the award in No. 96-2586/2588 was otherwise unreasonable as conclusory and unsubstantiated. Finally, the District Court declined to increase the rate of payment for a paralegal to the prevailing market rate because she had been approved at an established lower rate. Defendants and plaintiffs filed timely notices of appeal and cross-appeal. [FN1]

FN1. Plaintiffs filed a motion for reconsideration of the constitutional challenges they made to the PLRA's fee provision in *Glover*, No. 96-2586/2588, which the court denied. Plaintiffs timely appealed the denial of its motion. Because we decide that the PLRA

> fee provision is inapplicable to this case, we need not and do not reach plaintiffs' constitutional arguments.

B. The Prison Litigation Reform Act (PLRA).

The Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996), (PLRA), was signed into law by President Clinton and took effect on April 26, 1996. The PLRA was intended to curtail the overly intrusive involvement of federal courts in managing state prison systems pursuant to remedial orders and consent decrees such as those involved in *Glover* and *Hadix*. *See, e.g.*, 141 Cong. Rec. S 14315 (daily ed., Sept. 26, 1995) (statement of Sen. Abraham) ("The legislation I am introducing today [S. 1275] will return sanity and State control to our prison systems by limiting judicial remedies in prison cases [such as those in the State of Michigan] . . . ."); 141 Cong. Rec S 14414 (daily ed., Sept. 27, 1995) (statement of Sen. Dole) ("these guidelines will work to restrain liberal federal judges who see violations on [sic] constitutional rights in every prisoner complaint who have used these complaints to micromanage state and local prisons."). The authors of the PLRA expressed great concern about the cost of prison litigation to state and local governments. When introducing S. 1279, Senator Dole expressed dismay that prison litigation cost the states $81 million annually. 141 CONG. REC. S 14413 (daily ed., Sept. 27, 1995). Senator Hatch, noting that 45% of all federal civil cases in Arizona in 1994 had been filed by prisoners, declared that "it is time to wrest control of our prisons from the lawyers and the inmates * * *." *Id.* at 14418. *See, also.*, 141 Cong. Rec. S 14312, S 14316 (daily ed. September 26, 1995) (statement of Sen. Abraham) (one goal of PLRA is to reduce litigation which "raises the cost of running prisons far beyond what is necessary"). In the House, the committee report noted that costs to state and local governments would be reduced by a more proportional system for awarding fees and by eliminating financial incentives to litigate such ancillary matters as, notably, fee petitions. H.R. Rept. 104-21, "Violent Criminal Incarceration Act of 1995" at 28 (Feb. 6, 1995).

A second purpose of the PLRA was to stem the tide of frivolous prisoner suits. *See, e.g.*, 141 Cong. Rec. S 14316 (daily ed., Sept. 26, 1995) (statement of Sen. Abraham) (in addition to problems with "massive judicial interventions in state prison systems, we also have [the problem of] frivolous inmate litigation); 141 Cong. Rec. S 14414 (daily ed., Sept. 27, 1995) (statement of Sen. Dole) (legislation introduced, S. 1279, will address the "alarming number of frivolous lawsuits" filed by prisoners). Section 803(d) of the PLRA, 42 U.S.C. § 1997e(d)(3), includes the provision governing the award of attorney fees in prisoner civil rights litigation. It provides in relevant part:

> (d) Attorney's fees
>
> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. § 1988), such fees shall not be awarded, except to the extent that --
>
> * * *
>
> (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18, United States Code, for payment of court-appointed counsel.

In the United States District Court for the Eastern District of Michigan, $75.00 per hour is the maximum amount a court-appointed attorney may be reimbursed pursuant to 18 U.S.C. § 3006A(d)(1). The established rate of pay for Respondents' attorneys in both cases has been $150.00 per hour since at least 1993. The PLRA cap on attorney fees would reduce this amount to $112.50 per hour.

SUMMARY OF ARGUMENT

The plain text of section 803(d), the nature of attorney fee awards and this Court's longstanding retroactivity jurisprudence all support the conclusion that the attorney fee limitation applies to attorney fee awards made after the effective date of the Act, regardless when the services were rendered.

The clear and unambiguous words of the statute apply to all pending cases and all awards of attorney's fees made after the Act's effective date: "In *any* action brought by a prisoner who *is* confined. . . in which attorney fees are authorized. . . . No *award* . . . shall be based. . . ."

Even though the statute does not expressly state that it is applicable to pending cases, this Court's longstanding retroactivity jurisprudence compels that result. Questions of attorney's fees are "collateral to the main cause of action" and are "uniquely separable" from it. *Landgraf v. USI Film Products*, 511 U.S. 244, 277 (1994). Fee shifting statutes like the one at issue here are procedural in nature, prospective and injunctive in operation and do not involve vested rights. Because the desire for attorney's fees at an ever-increasing "prevailing rate" is merely a unilateral hope rather than an entitlement, applying an intervening fee shifting statute in pending litigation does not result in any unfairness. The appropriate compensation for plaintiffs' counsel in prison condition cases is subject to the discretion of Congress and there is no constitutional, statutory or jurisprudential reason not to give effect to Congress's obvious intent in all cases where attorney's fee awards are made after the effective date of section 803(d) regardless when the services were rendered.

ARGUMENT

THE ATTORNEY FEE PROVISION OF PLRA SECTION 803(d) APPLIES TO FEES AWARDED AFTER THE EFFECTIVE DATE OF THE ACT FOR SERVICES RENDERED BEFORE AND AFTER THAT DATE.

In determining a statute's temporal reach, this Court has said that the normal rules of construction apply. *Lindh v. Murphy*, 521 U.S. 320, 117 S. Ct. 2059, 2063 (1997). With respect to a claim that a statute enacted during the course of litigation has an impermissibly retroactive effect, the Court has also noted the tension between two seemingly contradictory principles of interpretation:

> The first is the rule that "a court is to apply the law in effect at the time it renders its decision," *Bradley [v. Richmond School Board*, 416 U.S. 696], at 711, 40 L. Ed. 2d 476, 94 S. Ct. 2006. The second is the axiom that "[r]etroactivity is not favored in the law," and its interpretive corollary that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen [v Georgetown Univ. Hospital*, 488 U.S. 204,] at 208, 102 L. Ed. 2d 493, 109 S. Ct. 468 [(1988)].

Landgraf, 511 U.S. at 264. In *Landgraf*, the Court noted that the *Bradley* principle of applying the law in effect at the time of decision did not "displace the traditional presumption against applying statutes affecting substantive rights, liabilities or duties to conduct arising before their enactment." 511 U.S. at 278. For such "genuinely 'retroactive'" substantive statutes, 511 U.S. at 277, the Court went on to articulate the appropriate analysis, 511 U.S. at 580:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach.

> If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Statutes concerning attorney's fees do not meet the criteria of "affecting substantive rights, liabilities or duties." *Landgraf*, 511 U.S. 278. Application of the fee limitation to awards made after the effective date of the PLRA is clearly intended by the language of the statute, does not have a retroactive effect and would not result in a manifest injustice.

A. The Plain Language of PLRA Section 803(d) Makes It Applicable to All Fees Awarded After the Effective Date of the Act For Services Rendered Before and After That Date

Under the first step of the *Landgraf* analysis, the Court must consider whether "Congress has expressly prescribed the statute's proper reach." Although neither the text nor the legislative history of the PLRA expressly address the precise question of whether the attorney's fee provision applies to cases pending on the Act's effective date, the text offers significant guidance.

The plain language of PLRA, section 803(d), makes it applicable to all attorney fee awards after the effective date of the Act, no matter when the litigation was begun or when the services were rendered. The attorney fee provision unmistakably applies to "*any* action *brought* by a prisoner who *is* confined to any jail, prison, or other correctional facility." Section 803(d)(1)(emphasis added). Regardless when the case

was filed, the Act applies; the statute by its terms targets any post-enactment award in "any" action "brought" by any person who "is" confined as of the effective date. The use of the absolute "any," the use of the past-tense verb "brought" and the application to all current prisoners all support the conclusion that the text is simply not susceptible to another meaning. *See, Madrid v. Gomez*, 150 F. 3d 1030, 1035 (9th Cir., 1998). The "in *any* action *brought* by a prisoner who *is* confined" language uses no words of temporal restriction, plain or obscure. On its face, it is comprehensive, embracing *all* such actions, irrespective of when they were filed or when services were rendered. The word "any" is absolute and all-encompassing. In its conventional usage, "any" means "ALL - used to indicate a maximum or whole." *Webster's Ninth Collegiate Dictionary*, 93 (1st ed. 1986).

In *Hutto v. Finney*, 437 U.S. 678, 694 (1978) this Court rejected an Eleventh Amendment challenge to an award of attorney fees assessed as part of costs and interpreted language in the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 which also applies in the present case: "In any action . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee. . . ." The Court said, 437 U.S. at 694:

> The Act itself could not be broader. It applies to "any" action brought to enforce certain civil rights laws. It contains no hint of an exception. . . ."

Cf. United States v. Williams, 514 U.S. 527, 531-532 (1995) (the statutory words "Any civil action . . . for the recovery of any . . . tax alleged to have been erroneously . . . collected" found to demonstrate the "unequivocally expressed" intent of Congress to waive immunity). In *Lindh v. Murphy*, 521 U.S. 320; 138 L. Ed. 2d 481, 117 S. Ct. at 2064, n. 4. (1997), the Court acknowledged the force of categorical language such as "all" and "any" and quoted the unenacted precursor to the statute addressed in *Landgraf* as an example of language that might qualify as a clear statement: "[This Act] shall apply to all proceedings pending on or commenced after the date of enactment of this Act." *Id.*

The only way to foster an alternative meaning for the word "any" would be to add language to what Congress has written. The attorney fee provision operates in "any action," not in "any action filed after the effective date." *Id.* A court should not alter a statute's effect by reading into the text words which Congress chose to omit.

In *Alexander S. v. Boyd*, 113 F.3d 1373, 1386 (1997), *cert. den.* 139 L. Ed. 2d 869 (1998), the court held section 803(d) applicable to all awards of attorney fees after the effective date of the Act, regardless of the date the services were performed, and its analysis correctly applied the statutory language:

> The plain language of the statute mandates that all attorney's fees awarded after April 26, 1996, in any prison conditions lawsuit comply with the restrictions imposed by the PLRA. *See Williams v. U.S. Merit Sys. Protection Bd.*, 15 F. 3d 46, 49 (4th Cir. 1994) (stating that "[s]tatutory construction begins with a examination of the literal language of the statute" (quotations omitted)). There is, quite simply, no award until an order is issued, and all of the orders appealed were entered after the statute's enactment. Congress could have easily inserted language to restrict the application of these limitations to awards for work performed subsequent to the PLRA's enactment, but it did no do so. (Footnotes omitted.)

Judge Motz, concurring in the judgment, also used a correct analysis, 113 F.3d at 1392:

> The plain language of the statute directs that it applies when a court makes its award, not when an attorney completes his work, or totals his time, or submits his fee request, but when a court awards fees. Therefore, the only "retroactivity" question involving § 1997(d)(3)

> is whether it applies to fees awarded before its enactment. Because the fees at issue here were awarded . . . a month after the effective date of the statute (April 26, 1996) this case presents no retroactivity question.

Although it erroneously declined to apply section 803(d) to any pending case, even the Court of Appeals in the present case recognized that the applicability of the statute cannot turn on the timing of the work. *See*, Pet. App., 11a. ("We do not believe the statutory language is capable of such a sophisticated construction.") Moreover, section 803(d)(3) emphatically states: "*No* award of attorney's fees shall be based on an hourly rate greater than [$112.50]." 42 U.S.C. § 1997e(d)(3) (emphasis added). There can be only one interpretation of this word: "No" means "no." *See, Madrid* at *10-11.

As recently noted by the Court of Appeals for the Ninth Circuit in determining that the attorney fee limitation of the PLRA applies to cases which are pending at the time of its enactment:

> We acknowledge that Congress could have been even more precise than it was. For example, it could have added a sentence at the end of § 803 reciting that the attorney's fee provisions "apply both to cases pending on and to cases commenced after the enactment date." However, the Supreme Court has never required the most emphatic possible articulation of a statement, only an unambiguous directive. Indeed, in *Landgraf*, as Justice Scalia noted with dismay, the Court was even willing to look to legislative history to find a clear statement. See *Landgraf*, 511 U.S. at 287 (Scalia, J., concurring)(citing *Landgraf*, 511 U.S. at 257-63); *see also Automobile Club of Michigan v. Commissioner*, 353 U.S. 180, 184, 1 L. Ed. 2d 746, 77 S. Ct. 707 (1957) ("It is clear from the language of the section and its legislative history that Congress thereby confirmed the

> authority of the Commissioner to correct any ruling, regulation, or Treasury decision retroactively . . . ."](emphasis added). We therefore conclude that Congress's use of the word "any" unambiguously indicates that the PLRA's attorney's fee provisions apply to all actions, irrespective of when they were filed.

Madrid, supra, 150 F.3d at 1036-1037 (footnotes omitted).

B. Comparison of PLRA Section 802 with PLRA Section 803(d) Does Not Permit the Negative Inference That Congress Intended Section 803(d) to Apply Only to Cases Filed After the Enactment of the PLRA.

Despite the broad language of the statutory text, the Court of Appeals incorrectly concluded that Congress intended not to apply the fee provisions to pending cases. The PLRA is comprised of ten sections; the attorney fee provisions, codified at 42 U.S.C. § 1997e(d), are contained in section 803. Only section 802, dealing with injunctions, consent decrees and other prospective relief in prison litigation, codified at 18 U.S.C. § 3626, expressly applies to pending actions.[4] According to the Court of Appeals' Opinion, the fact that Congress expressly applied section 802 to pending cases and did not expressly do so in the attorney fee provisions of section 803(d) leads to the inference that Congress intended the fee provisions to apply only to cases filed after the Act's passage. Pet. App., 1a. Petitioners contend the Court of Appeals reads too much into Congress's silence.

Contrary to the Court of Appeals decision, Congress's prescription of the temporal reach of section 802 of the PLRA has no implications for the Act's attorney fee provisions. Where, as here, two provisions have distinctly different

[4] Section 802(b)(1) of the PLRA provides: "Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title."

effects, the presence of an express temporal limit in one has little bearing on the absence of an express limit in the other. *See Lindh v. Murphy, supra*. In *Lindh*, this Court was presented with the question whether the Antiterrorism and Effective Death Penalty Act's (AEDPA) amendments to chapter 153 of Title 28 applied to cases pending at enactment. As here, Congress was silent as to the amendments' temporal reach. However, Congress explicitly provided that the AEDPA's amendments to another chapter, chapter 154 of Title 28, "shall apply to cases pending on or after the date of enactment of the Act." Pub. L. No. 104-132, § 107(c), 110 Stat. 1214 (Apr. 24, 1996).

In determining what implications to draw from Congress's different treatment of the two sets of amendments, this Court compared the effects of the two provisions. The amendments to chapter 153 created new standards for the review of habeas corpus petitions filed by state prisoners; likewise, the amendments to chapter 154 created new standards for the review of habeas corpus petitions filed by state prisoners under capital sentences. *Lindh*, 117 S. Ct. at 2063-64. The fact that both provisions "govern standards affecting entitlement to relief" was "significant" to this Court. *Id*. at 2064. In part because of this similarity, this Court concluded that Congress's silence with regard to the temporal reach of the chapter 153 amendments could be read as signaling its intent that the amendments not be applied to pending cases. *Id*. at 2064-65.

Both AEDPA chapters considered in *Lindh* established the standard for review for habeas corpus petitions filed by state prisoners. No such similarity exists between sections 802 and 803 of the PLRA. Section 802 of the PLRA creates new standards for awards of prospective relief in litigation over prison conditions. It prohibits the award of prospective relief unless the relief is "narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." Section 802(a), 18 U.S.C. § 3626(a)(1). Moreover, it provides for "immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court" that the new conditions just

described were met. Section 802(a), 18 U.S.C. § 3626(B)(2) ("immediate termination provision"). At the time of the Act's passage, numerous awards of prospective relief already existed, over which many federal judges across the country retained continuing jurisdiction. In light of those existing orders, it is unsurprising that Congress made its intentions -- that the new substantive provisions would in fact apply to those orders -- absolutely clear.

By contrast, the provisions at issue here -- located in section 803 of the Act -- merely govern the award of attorney fees. The provisions have no effect on the substantive judgments or awards already entered. These provisions thus have nothing in common with section 802 of the Act. Congress's decision to affirmatively prescribe the temporal reach of section 802, therefore, has no bearing on Congress's silence on the reach of the fees provisions. *See, Id.* The failure of Congress to include language in section 803 specifically dealing with pending cases is not a case where "Congress' silence in this regard can be likened to the dog that did not bark." *Chisom v. Roemer*, 501 U.S. 380, 396 n. 23 (1991)

The Court of Appeals reviewed a part of the legislative history and conceded that the negative inference to be drawn from the Senate's decision to include the attorneys' fees provision in section 803 rather than in section 802 "is weaker than the inference drawn in *Lindh*." (Pet. App., p. 16a). Despite this concession, the Court erroneously concluded: "Nonetheless, the identical negative inference that was drawn in *Lindh* can be drawn when sections 802 and 803 are compared." *Id.* Section 802, the Court wrote, was addressed to restrain perceived judicial excesses in prison litigation, past and future. By contrast, section 803 is "forward looking," "aimed at the filing of frivolous lawsuits." (Pet. App., p 16a).

The Court of Appeals' analysis is flawed for a number of reasons. First, *Lindh* found a negative inference to be justified only when two parts of a statute are so closely related that the strong implication is that, in choosing different language, Congress drew a "deliberate * * * contrast" between them. *Lindh*, 117 S. Ct. at 2065. Where statutory provisions are less closely related, the negative inference is far weaker, especially

when other textual pointers suggest a different result. *See, Field v. Mans*, 516 U.S. 59, 67-68, 75 (1995). In *Lindh*, chapters 153 and 154 were complementary halves of the entire habeas corpus portion of Title 28. Similarly, *Field* compared two paragraphs of a Bankruptcy Code subsection. By contrast, sections 802 and 803 amend disparate laws in Titles 18 and 42.

More importantly, the subject-matters of sections 802 and 803 are wholly distinct. Section 802 sets substantive limits on prison reform litigation. Under *Landgraf*, an express direction by Congress was necessary to limit previously issued injunctions.[5] Without the language in section 802, courts would be under no obligation to amend those injunctions or bring them to an end. The absence of similar language in section 803 of the PLRA is easily explained because there is no similarly compelling reason to specify that the law will apply to conduct -- such as work to be done by lawyers in the future --which would occur only after the Act's effective date.

Second, *Lindh* found it critical -- even dispositive -- that chapters 153 and 154 both fell on the substantive side of the *Landgraf* default rule. *Lindh*, 117 S. Ct. at 2063-2064. That permitted this Court to conclude that Congress, legislating with presumed knowledge of *Landgraf's* "predictable background rule" (*Landgraf*, 511 U.S. at 273), had deliberately chosen to treat chapters 153 and 154 disparately. The *Lindh* analysis yields an entirely different result here. Section 802, designed to reopen existing injunctions, reaches the merits of the litigation and is plainly substantive. By contrast, section 803(d) in the present context, deals only with attorney fees and is considered procedural and collateral. *Landgraf*, 511 U.S. at 277. In light of Congress's presumed familiarity with *Landgraf*, *Lindh* compels the conclusion that Congress intended both sections to apply to pending litigation despite differences in language. Under *Landgraf* and *Lindh*, section 802 is substantive and, therefore, retroactive because Congress explicitly said so; section 803(d) applies to pending cases because Congress knew it to be procedural.

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5 *See, e.g.*, 18 U.S.C. § 3626(b)(2), as amended by PLRA § 802(a), which permits the immediate termination of prospective relief if the relief had been approved or granted without a finding now required by the PLRA.

Third, the Court of Appeals misunderstood the purpose of the PLRA's attorney fee provisions and therefore mistakenly assumed that the provisions could only be "forward looking." (Pet. App., 16a). The purpose of the fee provisions was plainly *not* to curtail frivolous lawsuits, as the Sixth Circuit supposed. Fees are never awarded unless the plaintiff is the prevailing party. By definition, if the plaintiff is entitled to fees, it is because the litigation was *not* frivolous. The more likely explanation for § 803(d) is that Congress wanted to protect state and local government treasuries from the enormous costs of *successful* litigation. Without restrictions, fee-shifting substantially increases the financial burden of prison litigation, sometimes exceeding the other costs of court-ordered relief. That is especially so when monitoring by counsel extends over decades, as in these cases. In Michigan alone, the difference between paying attorney fees at prevailing market rate and paying at the lower PLRA limited rate from 1996 through June 1998 amounts to approximately $548,000 in four pending class-action prison condition cases. That difference will be intensified since plaintiffs' counsel is seeking an increase in their hourly rate from $150 per hour to $200 per hour beginning in January, 1998.

Congress's concern about this financial hemorrhaging is not inherently "forward looking," as the lower court incorrectly assumed. Congress was fully aware of the seemingly endless nature of much prison litigation. It is far more likely, therefore, that Congress intended the attorney fee provisions to apply to pending litigation, especially for work performed after the PLRA's effective date, in order to give states and local governments immediate relief from the future long-term, expenses of existing litigation. *Cf. Landgraf*, 511 U.S. at 267-268 ("Retroactivity provisions often serve entirely benign and legitimate purposes . . . [such as] simply to give comprehensive effect to a new law Congress considers salutary").

The Court of Appeals erred in drawing any negative inferences from the express inclusion of a provision making section 802 applicable to pending cases and the absence of such an express provision from section 803(d). *Landgraf*, 511 U.S. at 259 (rejecting argument that "because Congress

provided specifically for prospectivity in two places . . . we should infer that it intended the opposite for the remainder of the statute").

C. Applying the Attorney Fee Provisions to Awards Made After the PLRA's Effective Date in Pending Litigation Will Have No Impermissible Retroactive Effect.

A statute is not retroactive "merely because it is applied in a case arising from conduct antedating the statute's enactment, . . . or upsets expectations based in prior law." *Landgraf*, 511 U.S. at 269. Nor is it retroactive simply because it "draws upon antecedent facts for its operation," because it might be unfair or because it might operate to a party's disadvantage. *Id.*, at 267, 275 n.28.

> Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates "retroactively" comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

Landgraf, 511 U.S. at 269-270. *See, id.*, at 269 n.23 citing, *inter alia*, *Miller v. Florida*, 482 U.S. 423, 430 (1987) ("A law is retrospective if it 'changes the legal consequences of acts completed before its effective date'") and *Sturges v. Carter*, 114 U.S. 511, 519 (1855) (a retroactive statute is one that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability"). The presumption against retroactive legislation is grounded in "[e]lementary considerations of fairness [which] dictate that individuals should have an opportunity to know what the law is and *to conform their conduct accordingly*." *Landraf*, 511 U.S. at 265. (emphasis added); *see also, Id.* at 270 ("familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance" in determining whether a statute would have

a retroactive effect). Thus, a statute would have a retroactive effect if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id*. at 280. In *Landgraf*, 511 U.S. at 277-278, this Court noted the "traditional presumption" against applying "genuinely 'retroactive'" statutes affecting "substantive rights, liabilities or duties" to conduct arising before the enactment, but also noted the continuing vitality of the *Bradley* principle of applying the law in effect at the time of a court's decision. In the present case, applying the attorney fee provisions only to awards made after the PLRA's passage would have no impermissible retroactive effect.

This Court has recognized at least three situations in which application of an intervening statute is "unquestionably proper": statutes conferring or ousting jurisdiction, statutes affecting matters of procedure (in which parties have "diminished reliance interests") and statutes affecting the propriety of prospective relief. *Landgraf*, 511 U.S. at 273-275. The latter two are particularly relevant in the present case. In *Bradley v. Richmond School Board*, 416 U.S. 696 (1974) this Court unanimously held that a statute permitting an award of attorney fees which was enacted while the case was pending should be applied. The Court relied upon the principle that a court should apply the law in effect at the time it renders its decision unless manifest injustice would result and in order to evaluate whether injustice occurred, the Court examined the nature and identity of the parties, the nature of their rights and the nature of the impact of the change in law upon those rights. *Bradley*, at 716-717. It concluded that application of the new attorney fee statute would not "infringe upon or deprive a person of a right that had matured or become unconditional" and would not cause a "change in the substantive obligation of the parties." *Bradley* at 720, 721. This is fully consistent with this Court's attorney fee jurisprudence which clearly establishes that questions of attorney fees are incidental to, and independent from, the underlying substantive cause of action. As this Court said in *Landgraf*, 511 U.S. at 277:

> [T]the attorney's fee provision at issue in *Bradley* did not resemble the cases in which we have invoked the presumption against statutory retroactivity. Attorney's fee determinations, we have observed, are "collateral to the main cause of action" and "uniquely separable from the cause of action to be proved at trial." *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 451-452, 71 L. Ed. 2d 325, 102 S. Ct. 1162 (1982). *See also. Hutto v. Finney*, 437 U.S. 678, 695, n 24, 57 L. Ed. 2d 522, 98 S. Ct 2565 (1978)

The underlying litigation in the present case did not seek money damages, but rather sought declaratory and injunctive relief, which are inherently prospective in nature, and this prospectivity is a further reason for concluding that section 803 is not retroactive. *Landgraf*, 511 U.S. at 273-274, citing *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 201 (1921) for the propositions that "relief by injunction operates *in futuro*,"and that the Plaintiff had no 'vested right' in the decree entered by the trial court." Moreover, several post-*Bradley* decisions have determined that applying new statutory provisions regarding attorney fee provisions to pending civil actions does not "impose an additional or unforeseeable obligation" upon the parties. *Landgraf*, 511 U.S. at 278; *see, e.g., Morgan Guaranty Trust Co. v. Republic of Palau*, 971 F.2d 917, 922-23 (2nd Cir. 1992) (finding no retroactivity issue to exist where fees were awarded only for the period subsequent to passage of a new amendment); *Simmons v. Lockhart*, 931 F.2d 1226, 1229-1231 (8th Cir. 1991) (awarding fees under old scheme for work performed before passage of new provision, and under new scheme for work performed after enactment); *Alexander S. v. Boyd*, 113 F.3d 1373, 1387-1388 (4th Cir. 1997) *cert. den.* 139 L. Ed. 2d 869 (1998).

The fact of prospectivity in the present case is reinforced when it is recalled that the substantive question of liability was resolved years ago and the fees respondents now seek are for monitoring compliance with long-established orders. The attorney fees in the present case are prospective and

procedural rather than substantive in nature. While attorney's fee statutes are intended "to ensure 'effective access to the judicial process' for persons with civil rights grievances, *Hensley v. Eckerhart*, 461 U.S. 424, 429 (quoting H.R. Rep. No. 94-1558, p 1 (1976)), in the present case that purpose has long since dissipated. In an earlier appeal in this very litigation the Court of Appeals rejected respondents' efforts to have the petitioners pay for expensive, out-of-state expert counsel and said, *Hadix v. Johnson*, 65 F.3d 532, 535(6th Cir. 1995):

> The case at bar is unlike most complex institutional litigation, where the time commitment and uncertainty of payment often discourage economically rational private attorneys from becoming involved. The predominant reason institutional reform plaintiffs usually have difficulty finding counsel, as the Supreme Court observed in connection with contingent-fee arrangements, is that "in any legal market where the winner's attorney's fees will be paid by the loser ... attorneys [are likely to] view [the] case as too risky (i.e., too unlikely to succeed)." *City of Burlington v. Dague*, 505 U.S. 557, 564, 112 S. Ct. 2638, 2642, 120 L. Ed. 2d 449 (1992).

No such risk is present here. The consent decree that governs this case virtually guarantees fee awards. The case is hardly renowned for a lack of litigiousness, moreover, and it shows few signs of winding down. From counsel's standpoint, *Hadix* more closely resembles a cash cow than a bottomless pit. It is highly likely that the guaranteed stream of income this litigation offers would prove a more potent lure for competent counsel than the more ephemeral promise of a fee award at counsel's usual rate in the case of victory--and it is the desire to "achieve the ... goal of mirroring market incentives" that drives the policy underlying the fee-shifting statutes. Dague, 505 U.S. at 563-65, 112 S. Ct. at 2642; *see also*

> *Student Public Interest Research Group v. AT & T Bell Laboratories*, 842 F.2d 1436, 1449 (3d Cir. 1988). (Footnote omitted.)

There is no impermissible retroactivity merely because legislation affects conduct that was based upon prior existing law. "No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *New York Central RR Co. v. White*, 243 U.S. 188, 198 (1917); *see Landgraf*, 511 at 269, n. 24, quoting L. Fuller, The Morality Of Law 60 (1964):

> A man may decide to study for a particular profession, to get married, to limit or increase the size of his family, to make a final disposition of his estate--all with reference to an existing body of law, which includes not only tax laws, but the laws of property and contract, and perhaps, even election laws which bring about a particular distribution of political power. If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever.

An award of attorney's fees under 42 U.S.C. § 1988 is discretionary and the applicant for fees bears the burden of establishing the appropriateness of an award. *Hensley v. Eckerhart*, 461 U.S. 424 (1983). There is no guarantee that fees will be recovered at all, *Kentucky v. Graham*, 473 U.S. 159, 168 (1985), and it is clear that Congress bestowed fee eligibility on the "prevailing *party*" not the attorneys. *Evans v. Jeff D.*, 475 U.S. 717, 731-732 (1986) (emphasis in original). At the commencement of this litigation neither Respondents nor their attorneys had any claim of entitlement to attorney's fees at all, much less at any particular rate. At most they had a unilateral hope. Since Respondents prevailed, Petitioners acknowledge that Respondents are eligible under 42 U.S.C. § 1988 to some fees, but they still have no entitlement to any particular rate. Their desire for awards at constantly-increasing prevailing rates remains no more than a unilateral

expectation. In *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989) this Court discussed the difficulties of using the mental state of the parties as the basis for determining questions of attorney's fees. In deciding the proper standard for determining whether a party has "prevailed" so as to be eligible for an award of fees the Court rejected a test which required a determination whether the party succeeded on "the central issue" since that would require an unwieldy and impractical examination of thought processes, 489 U.S. at 791:

> Nor does the central issue test have much to recommend it from the viewpoint of judicial administration of § 1988 and other fee shifting provisions. By focusing on the subjective importance of an issue to the litigants, it asks a question which is almost impossible to answer. Is the "primary relief sought" in a disparate treatment action under Title VII reinstatement, backpay, or injunctive relief? This question, the answer to which appears to depend largely on the mental state of the parties, is wholly irrelevant to the purposes behind the fee shifting provisions, and promises to mire district courts entertaining fee applications in an inquiry which two commentators have described as "excruciating." *See* M. Schwartz & J. Kirklin, Section 1983 Litigation: Claims, Defenses, and Fees § 15.11, p 348 (1986). Creating such an unstable threshold to fee eligibility is sure to provoke prolonged litigation, thus deterring settlement of fee disputes and ensuring that the fee application will spawn a second litigation of significant dimension.

A lawyer's decision to represent a client and file a case cannot reasonably be based upon the assumption that he or she will be entitled to the same rates of compensation for the life of the case. Indeed, given that fees are only shifted if the plaintiff wins, that fee awards generally take into account changes in market rates over time, and that courts routinely

apply the statutory law in effect at the time of decision to attorney fees, *Landgraf*, 511 U.S. at 264 (citing *Bradley*, 416 U.S. at 711), a lawyer's expectation is precisely the opposite.

In *Hutto v. Finney, supra*, 437 U.S. 678 and *Bradley v. Richmond School Board, supra*, 416 U.S. 696, this Court applied to pending cases attorney's fee statutes favorable to plaintiffs. In addition, for the past 20 years Respondents in the present cases have benefited from a constantly increasing "prevailing rate" of fees. Now Congress has acted to impose a limit on fees which would otherwise be awardable in this type of case but there is no reason not to apply this restriction in pending cases. Applying the PLRA's attorney fee limitations to all awards made after April 26, 1996 does not have an impermissible retroactive effect because the determination of attorney fee awards, which are collateral to the main cause of action, does not attach new legal consequences to completed events. Applying the PLRA fee limitations to Respondents will not "impair rights possessed when [they] acted, increase liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. Limiting prisoners' attorney fees to 150 percent of the amount allowed for court-appointed counsel is not "so fundamentally unfair as to result in manifest injustice." *Farrar v. Hobby*, 506 U.S. 103, 115 (1992) (instructing that section 1988 was "never intended to produce windfalls to attorneys"); *see also, Id.* at 122 (stating that section 1988 "is not a relief Act for lawyers").

The Court of Appeals decision is simply not a reasonable construction of a statute that was intended in part to lower the costs to states of prison litigation.

CONCLUSION

For all these reasons, Petitioners respectfully urge this Court to reverse the Court of Appeals and hold PLRA section 803(d) applicable to all awards of attorney's fees made after the effective date of the Act, regardless when the services were rendered.

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